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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 1190.

SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO AND COMPANHIA DE DIAMANTES DE ANGOLA,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI, PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT OF THE PETITION.

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April 6, 1945.

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SUPREME COURT OF THE UNITED STATES

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Respondent.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI.

Now comes John M. Harlan, counsel for the Petitioners above-named (appearing specially for the purpose of this motion and reserving all rights under a motion now pending in the District Court of the United States for the Southern District of New York to dismiss the action against said petitioners and to quash purported service of process upon them upon the grounds that said Court has no jurisdiction over them and that service of process upon them has not been validly effected) and respectfully moves this Court for leave to file the petition for writ of certiorari, hereto annexed, under Section 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. § 377), directed to the District Court of the United States for the Southern District of New York, to review an order of that Court, entered April 3, 1945, more particularly described in the petition, and for such other and further relief as may be just and proper.

JOHN M. HARLAN,
Counsel for Petitioners,
31 Nassau Street,
New York, N. Y.

April 6, 1945.

SUPREME COURT OF THE UNITED STATES
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SOCIETE INTERNATIONALE FORESTIERE ET MINIERE DU CONGO and COMPANHIA DE DIAMANTES DE ANGOLA,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Societe Internationale Forestiere et Miniere du Congo (hereinafter called "Forminiere"), and Companhia de Diamantes de Angola (hereinafter called "Diamang"), appearing specially for the purpose of this petition and reserving all rights under a motion now pending in the District Court of the United States for the Southern District of New York to dismiss the action against said petitioners and to quash purported service of process upon them upon the grounds that said Court has no jurisdiction over them and that service of process upon them has not been validly effected, respectfully pray that a writ of certiorari issue to the District Court of the United States for the Southern District of New York, to review an order of that Court entered April 3, 1945 (R., pp. 99-102), granting the respondent's motion for a preliminary injunction against the transfer or disposition of any assets of the petitioners found in the United States on January 29, 1945,

until the determination of the issues in the action and until the petitioners shall have complied with any final decree that may be entered therein.

A transcript of the record is furnished herewith.

Summary Statement.

The matter involved is an order, entered in a suit in equity brought by the Attorney General against the petitioners and others under the Anti-Trust Laws, requiring in effect that all the property of the defendants found in the United States at the time of the institution of the action be sequestered and held during the pendency of the action and until the defendants shall have complied with any final decree that may be entered against them. (R., pp. 99-102.) The purpose of the sequestration is to provide a fund to be held for an indefinite period of time as security for the enforcement of any decree that may be entered if the respondent is ultimately successful in the action. The order was entered before the determination of any of the issues in the action and before the petitioners' time to answer had expired. The petitioners have property in the United States affected by the order aggregating in value some $779,000. (R., pp. 45-46, 49.)

The action was brought for injunctive relief against alleged violations of the Sherman Act[1] and the Wilson Tariff Act[2]. The business involved is the production and sale of rough diamonds. The petitioner "Forminiere" is a corporation organized under the laws of the Belgian Congo; the petitioner "Diamang" is a Portuguese corporation. They are engaged in the business of mining diamonds in Africa, largely for industrial uses. The principal ground of complaint is the allegation that the producers of diamonds in Africa, including the petitioners, sell their entire output to a South African corporation known as Diamond

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[1] Act of July 2, 1890, ch. 647, §§1, 2, 4, 26 Stat. 209, 15 U. S. C. §§1, 2, 4.

[2] Act of August 27, 1894, ch. 349, §§73, 74, 28 Stat. 570, 15 U. S. C. §§8, 9.

Corporation, Ltd., one of the defendants in the action, and refuse to sell to others. This method of doing business is alleged to restrain the importation of diamonds into the United States and to enhance prices upon such importation. (R., pp. 12-13.)

The respondent's motion for a preliminary injunction was made at the time of the institution of the action. (R., p. 34.) It was based upon the allegations of the complaint, and upon affidavits of a Special Assistant to the Attorney General alleging that "The principal businesses and activities of said defendants are carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which the Court may render," and that "the foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases." (R., pp. 32, 33.)

The property of the petitioners affected by the order consists of credits established with New York banks for the purpose of buying machinery and supplies to be used in the operation of mines in Africa, together with a quantity of such machinery and supplies which had been purchased but not yet shipped. In the case of "Forminiere", the bank credits aggregate approximately $632,000, and the machinery and supplies purchased have a value of approximately $45,000. (R., pp. 45-46.) The bank credits of "Diamang" aggregate approximately $47,000, and the materials purchased amount to some $55,000. (R., p. 49.)

The respondent does not contend that there is anything unlawful in the ownership or use of these funds and materials. The contention is rather, as stated in the motion, that "sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants." (R., p. 34.)

The petitioners are suffering great and irreparable injury in being deprived of the use of these funds and materials. The machinery and supplies sought to be pur-

chased in the United States are intended to be used for the production of industrial diamonds, which are important to Allied war production and for which there is now an unprecedented demand. Such purchases have been interrupted by inability to make use of the funds brought to the United States for that purpose. The fact that the order does not apply to such funds as the petitioners may be able to bring to the United States after January 29, 1945, does not mitigate the hardship. Funds and property of great value have been rendered useless for an indefinite period, and the obtaining and transmission of dollar exchange in foreign countries is extremely difficult in time of war. (R., pp. 47, 79, 90.)

Jurisdiction to Review.

The date of the order of the District Court for the Southern District of New York sought to be reviewed was April 3, 1945.

Jurisdiction of this Court is invoked under Section 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C. §377). Grant of the common law writ of certiorari is sought in aid of the appellate jurisdiction of this Court in cases arising under the Federal Anti-Trust Laws.

Questions Presented.

1. Whether, in an action to prevent and restrain alleged violations of the Federal Anti-Trust Laws, before any of the issues in the action have been determined and indeed before joinder of issue, the defendants may be required to hold all of their assets found within the jurisdiction throughout the pendency of the action as security for the performance of any decree that may ultimately be entered.

2. Whether, if such a remedy exists, it should be granted upon the unsupported allegations of the complaint and the mere assertion that the defendants are nonresidents and could withdraw their assets and thereby prevent enforcement of a decree, especially where there is grave doubt

that the facts upon which the action is predicated constitute a cause of action cognizable by the courts of the United States.

Reasons Relied on for Allowance of Writ.

1. The order sought to be reviewed is entirely novel in character and is oppressive. In the interests of justice, such an order ought to be subject to prompt appellate review. Section 129 of the Judicial Code[1] provides for appeals to the Circuit Courts of Appeals from orders granting preliminary injunctions, but there is doubt whether this remedy is available in this case because of the provisions of the Expediting Act.[2]. See *United States* v. *California Cooperative Canneries*, 279 U. S. 553 (1929); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 322 U. S. 137 (1944); *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. (2d) 614 (C. C. A. 3rd, 1939). The petitioners have filed a notice of appeal from the order here involved to the Circuit Court of Appeals for the Second Circuit, to be relied upon in the event that it should be determined that certiorari should be denied in this case because of the existence of the remedy of appeal to the Circuit Court of Appeals. Unless a writ of certiorari is issued in this case or appeal to the Circuit Court of Appeals is permitted under Section 129 of the Judicial Code, the petitioners will be deprived of any review of the order until the final disposition of the action, which will necessarily be considerably delayed by war conditions and the difficulties of communication with foreign countries. This would be a denial of justice, since it will then be too late to repair the damage done to the petitioners by the immobilization of all their assets in this country.

2. The questions of Federal law decided by the District Court, as to the power of the court to require petitioners

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[1] Act of March 3, 1891, ch. 517, §7, 26 Stat. 828, 28 U. S. C. §227.

[2] Act of February 11, 1903, ch. 544, §§1, 2, 32 Stat. 823, 15 U. S. C. §§28, 29.

to hold all their assets found in this country at the time of the institution of the action as security for the performance of any decree that may ultimately be entered against them, and as to the circumstances in which such an order may be entered, are important and should be settled by this Court.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the District Court of the United States for the Southern District of New York, sitting in the Borough of Manhattan, City, County and State of New York, commanding said Court to certify and send up to this Court, on a day to be designated, a full and complete transcript of the record and of all proceedings in said District Court had in this case, to the end that this case may be reviewed and determined by this Court; that the order of said District Court be reversed; and that your petitioners be granted such other and further relief as may appear proper.

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Counsel for Petitioners,
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New York, N. Y.

April 6, 1945.

BRIEF IN SUPPORT OF THE PETITION.

Opinion Below.

The opinion of the District Court (R., pp. 97-99) has not been officially reported.

Argument.

POINT I.

The order of the District Court is properly subject to appellate review.

The order of the District Court deprives the petitioners of the use of three-quarters of a million dollars for a period which will necessarily be protracted; it interferes with the acquisition of materials and supplies sought to be purchased in the United States; and it may subject the petitioners to substantial liabilities to suppliers with whom contracts have been made for the manufacture of machinery and equipment. In the case of judicial action having such drastic consequences, the parties affected should not be denied the right of appellate review, even if the order were not of a novel and unique character in our law. Postponement of review of the order until after final decree in the action would be in effect denial of review because the force of the order would then have been spent and the damage done by it could not be repaired.

The propriety of appellate review of interlocutory injunction orders is recognized by Section 129 of the Judicial Code (26 Stat. 828, 28 U. S. C. 227), which provides generally that an appeal may be taken to the Circuit Court of Appeals from an interlocutory order or decree granting, continuing, modifying, refusing or dissolving an injunction.

The Expediting Act (32 Stat. 823, 15 U. S. C. §29), which provides that an appeal from a final decree of a District Court in equity suits brought by the United States under the Anti-Trust Laws shall lie only to this Court, does not expressly repeal Section 129 of the Judicial Code, which permitted an appeal to the Circuit Court of Appeals from an interlocutory injunction order in such a case. See, however, *United States* v. *California Cooperative Canneries*, 279 U. S. 553 (1929); *Allen Calculators, Inc.* v. *National Cash Register Co.*, 64 Sup. Ct. 905 (1944); *Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. (2d) 614 (C. C. A. 3rd, 1939). None of the cases cited involved a situation where there was a preliminary injunction or a statutory right of appeal to the Circuit Court of Appeals under the Judicial Code.

If the effect of the Expediting Act is to eliminate all appeals to the circuit courts of appeals in anti-trust cases brought by the United States and to vest exclusive appellate jurisdiction in this Court, then the only method by which the petitioners may obtain appellate review of the preliminary injunction order is by writ of certiorari issued under Section 262 of the Judicial Code. Such review would not be inconsistent with the objectives of the Expediting Act because it would not delay the progress of the action, which could proceed in ordinary course during the pendency of the writ. See *Ex parte National Enameling & S. Co.*, 201 U. S. 156 (1906). In this respect the situation differs from that presented in *United States* v. *California Cooperative Canneries*, and related cases, *supra*, which involved problems of intervention.

The granting of appellate review in this case would be in accordance with applicable legislation and would be in the interests of justice.

POINT II.

The order of the District Court exacting security from the petitioners for the performance of a possible future decree was beyond the powers of a Federal Court of Equity.

The property of the petitioners affected by the order of the District Court is not the subject matter of the action, and the possession and use of that property in the United States is not claimed to be unlawful. The order is therefore not designed to preserve a *res* which has been brought before the Court or to prevent and restrain violations of law. It is rather a requirement that the petitioners provide security for the performance of a possible future decree and is analogous to attachment or sequestration.

The availability of such a remedy in civil actions is regulated by Rule 64 of the Rules of Civil Procedure. Under this rule the seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action is available only (a) under the circumstances and in the manner provided by the law of the state in which the District Court is held or (b) to the extent authorized by any applicable statute of the United States.

A. The Law of New York does not permit the seizure or impounding of property in an action in equity as security for a decree which may be entered.

The statutes of New York permit attachment only in actions brought solely for the recovery of a sum of money. *N. Y. Civil Practice Act*, §902. Attachment will not lie in an action of an equitable nature whether or not the defendants are nonresidents. *Thorington* v. *Merrick*, 101 N. Y. 5 (1885).

In actions for equitable relief the only process known to the law of New York for the seizure or impounding of the property of a defendant is the writ of sequestration.

In accordance with the accepted usages of Chancery, both in England and in this country, sequestration is a contempt process and is available only after some order or decree has been entered against the defendant and he has failed to obey it.

Hosack v. *Rogers*, 11 Paige 603 (N. Y., 1845);
Pratt v. *Inman*, 43 Ch. Div. 175, 179 (1889);
Hulbert & Crowe v. *Cathcart* (1894), 1 Q. B. 244;
Skinner v. *Educational Pictures Securities Corporation*, 14 Del. Ch. 417, 129 Atl. 857 (1925);
Roberts v. *Stoner*, 18 Mo. 481 (1853).

The absence of power in cases of an equitable nature to require the provision of security for performance of a decree which may ultimately be entered is not remedied by denominating the order as an injunction instead of as an order for sequestration. The substance rather than the form of the order is determinative and an injunction designed to require the defendant to hold property as security for a decree to be entered has uniformly been denied.

Campbell v. *Ernest*, 64 Hun 188, 19 N. Y. Supp. 123 (Sup. Ct., 1892);
Platt v. *Elias*, 101 App. Div. 518 (1st Dept., 1905);
Guth v. *Groves*, 44 F. Supp. 851 (S. D. N. Y., 1942);
Hunnewell v. *New York Cent. & H. R. R. Co.*, 196 Fed. 543 (S. D. N. Y., 1911);
Cities Service Co. v. *McDowell*, 13 Del. Ch. 109, 116 Atl. 4 (1922);
Nelson v. *Smith*, 157 Ore. 292, 69 P. (2d) 1072 (1937).

B. No Federal statute authorizes the entry of an order requiring a defendant to hold a fund as security for a possible future decree.

Although there is no statute of the United States which purports to permit the requirement of security from a defendant in a civil action, the respondent relied in the

District Court on Section 262 of the Judicial Code (36 Stat. 1162, 28 U. S. C., §377) which provides that the Supreme Court, the circuit courts of appeals and the district courts may issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions. This statute is designed to enable the courts of the United States to issue the writs known to our system of jurisprudence in accordance with the principles of law developed for their proper application. The statute is express in requiring that the issuance of writs "be agreeable to the usages and principles of law." The use of the writ of attachment or sequestration to require a defendant in an action for equitable relief to hold security for a possible future decree is contrary to the usages and principles of law, and the use of injunction to accomplish the same result has never been countenanced.

The practice of the Federal courts in this regard has been uniform. Rules 7 and 8 of the Equity Rules formerly in effect permitted the use of attachment and sequestration only as contempt processes to compel obedience to interlocutory or final orders or decrees. Rule 70 of the Rules of Civil Procedure permits the use of attachment or sequestration against a "disobedient party" who has been directed by a judgment to perform some specific act and who has failed to do so. These rules of practice were framed with proper regard for the "usages and principles of law" and the courts of the United States have consistently refused to distort what is in its nature a process of contempt to the purpose of requiring security from a party who is not in contempt.

See

Ross v. *Grafton Power Company*, 60 F. (2d) 663 (D. Vt., 1932);

Martin v. *James B. Berry Sons' Co.*, 83 F. (2d) 857 (C. C. A. 1st, 1936).

The respondent also relied upon Section 4 of the Sherman Act (26 Stat. 209, 15 U. S. C. §4) which confers upon

the district courts jurisdiction "to prevent and restrain violations" of the substantive provisions of the Anti-Trust Laws and which empowers the court before final decree to "make such temporary restraining order or prohibition as shall be deemed just in the premises." The temporary restraining order or prohibition contemplated by this section is one designed to prevent or restrain violations, and the power given by Section 4 has never been used for any other purpose. There is no basis for contending that this section was intended to enlarge the powers of the district courts so as to permit them to fashion novel writs which would violate the established usages and principles of law.

POINT III.

Even if such a remedy were available, the granting of it in this case would constitute an abuse of discretion.

The respondent's motion was based upon the simple assertion that the petitioners could withdraw their assets from the United States and that if they did so the respondent would suffer irreparable injury. (R., p. 34.) This assertion, together with a complaint verified on information and belief by one who admittedly did not have personal knowledge of the facts, is the basis for an order depriving the petitioners of the use of property of great value for an indefinite period of time.

The allegation of irreparable injury is based upon a series of unsupported assumptions. It is first assumed that the respondent will prevail in the action. This is subject to grave doubt. The gravamen of the action appears to be that the petitioners and others have sought to confine their business activities to their own countries. A basic question exists whether their activities in Africa and Europe can be said to fall within the ambit of the laws of the United States. The petitioners were unable to present the facts bearing on the question within the time available because of the difficulties of communication due to war-time condi-

tions. They were under the strongest compulsion to oppose the motion for a preliminary injunction without awaiting the necessary proof in support of defenses to the action. (R., pp. 66-67.) The question whether our courts may deal with such foreign activities should of course be determined upon the evidence and not upon conclusory allegations and characterizations.

A further assumption made by the respondent is that if a decree should ultimately be entered against the petitioners they would refuse to obey it. There is no basis whatever for this assumption, and the likelihood of a refusal to comply with any decree is not even alleged. The petitioners are responsible corporations. Forminiere is largely owned by the Government of the Belgian Congo, which holds 55% of its outstanding stock. (R., p. 84.) The Government of Portugal holds a substantial interest in the profits of Diamang (R., p. 87.) There is no basis for an imputation that corporations operating under such auspices would be likely to flout decrees validly entered against them.

Finally, it is assumed that the court would be powerless to enforce its decree in any manner except by the imposition of fines for contempt and that such fines would not be collectible except out of sequestered funds. This too is a bare assertion without evidence, and inherently improbable.

As against the remote and hypothetical possibility which the respondent suggests as a ground for sequestration, the petitioners have been subjected to the immediate and known injury which necessarily flows from the impounding of assets worth hundreds of thousands of dollars. The injury is completely irreparable because the respondent cannot, of course, be required to furnish any indemnity.

No precedent has been found for such a drastic imposition upon parties against whom there has been no adjudication. Even after adjudication against a party and in the course of contempt proceedings against him, sound judicial discretion would require a showing of facts rather than conjecture as a basis for such an order. *Wahlgren v. Bausch & Lomb Optical Co.*, 77 F. (2d) 121 (C. C. A. 7th,

1935). Here the injury is inflicted upon parties who have not been found to have violated any law and as to whom issue has not yet been joined.

Respectfully submitted,

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April 6, 1945.